

FEDERAL CIRCUIT COURT OF AUSTRALIA

*JHINJAR v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 1861

Catchwords:

MIGRATION – Migration Review Tribunal – Skilled (Provisional) Class (VC) subclass 485 visa – applicant failing to attend Tribunal hearing – whether amended version of s.362B applied – whether legally unreasonable for Tribunal to determine matter in applicant’s absence – IELTS test results – bogus document – no compelling and compassionate circumstances for waiver of public interest criterion 4020.

Legislation:

Migration Act 1958, ss.5(1), 97, **362b**

Migration Amendment (Protection and Other Measures) Act 2015

Migration Regulations 1994, rr.1.03, 1.15c

Cases cited:

AZAFB v Minister for Immigration and Border Protection (2015) 68 AAR 171, [2015] FCA 1383

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, (2013) 139 ALD 181, (2013) 297 ALR 225, (2013) 87 ALJR 618, [2013] HCA 18

Applicant:	MANVIR SINGH JHINJAR
First Respondent:	MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File number:	MLG 1062 of 2015
Judgment of:	Judge Riley
Hearing date:	1 June 2016
Date of last submission:	3 June 2016

Delivered at: Melbourne

Delivered on: 1 August 2016

REPRESENTATION

Advocate for the applicant: In person

Solicitors for the applicant: None

Counsel for the first respondent: Nick Wood

Solicitors for the first respondent: Clayton Utz

Counsel for the second respondent: No appearance

Solicitors for the second respondent: Clayton Utz

ORDERS

- (1) The application filed on 13 May 2015 be dismissed.
- (2) The applicant pay the first respondent's costs fixed in the sum of \$7,206.
- (3)
- (4)
- (5)
- (6)

**FEDERAL CIRCUIT
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 1062 of 2015

MANVIR SINGH JHINJAR
Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First respondent

And

ADMINISTRATIVE APPEALS TRIBUNAL
Second respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application for review of a decision made by the Migration Review Tribunal (“the Tribunal”). In that decision, the Tribunal affirmed a decision of the delegate not to grant the applicant a Skilled (Provisional) Class (VC) subclass 485 visa.
2. The applicant applied for the visa on 10 January 2011. One of the criteria for the grant of the visa was that the applicant had competent English as defined in r.1.15C of the *Migration Regulations 1994* (“the Regulations”). The applicant attempted to satisfy that criterion by providing the results of an are International English Language Testing

System (“IELTS”) test, which he claimed to have undertaken on 16 April 2011.

3. According to the test report form, the applicant comfortably passed the IELTS test. However the International Development Program Education Pty Ltd (“IDP”) Audit and Investigation Unit for IELTS gave information to the Department of Immigration (“the Department”) on 22 September 2011 to the effect that it appeared that a person other than the applicant had undertaken the test and consequently the applicant’s test result of 16 April 2011 had been cancelled.
4. The Department wrote to the applicant on 23 January 2012 and conveyed the information from IDP. The Department’s letter also said that the information from IDP suggested that the test result provided by the applicant was a bogus document or that the applicant had provided false or misleading information. The Department’s letter invited the applicant to comment on the information from IDP and also provide a statement about any compelling or compassionate circumstances that might apply.
5. The applicant responded to that letter, essentially saying that there must have been some misunderstanding made by IDP. He did not point to any compelling or compassionate circumstances.

The delegate’s decision

6. The delegate’s decision noted that one of the criteria for the grant of the visa was that the applicant satisfied public interest criterion 4020. The delegate’s decision set out public interest criterion 4020. It essentially required that there be no evidence that the applicant had provided a bogus document or information that was false or misleading in a material particular to the Department.
7. The delegate’s decision noted that “bogus document” was defined in r.1.03 the Regulations to have the same meaning as set out in s.97 of the *Migration Act 1958* (“the Act”). That section provided that the term “bogus document” had the meaning set out in s.5(1) of the Act, which defined the term as follows:

“Bogus document” in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or*
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.*

8. The delegate concluded that the test report provided by the applicant was bogus. The delegate further concluded that the applicant did not satisfy public interest criterion 4020. The delegate noted that the applicant had not raised any compassionate or compelling circumstances that may have warranted the waiver of public interest criterion 4020. Consequently, the delegate concluded that the applicant did not meet the requirements of the visa and refused the application.

The application to the Tribunal

9. On 15 July 2013, the applicant sought review by the Tribunal. In his application, the applicant gave a residential address and an email address at which the Tribunal could contact him as well as a mobile telephone number. The Tribunal sent an acknowledgement of the application to the applicant on 19 July 2013. In its letter, the Tribunal said it was important to tell the Tribunal immediately if the applicant changed his contact details, and invited the applicant to provide any further material as soon as possible.
10. On 9 February 2015, the applicant telephoned the Tribunal seeking an update. The applicant was told that the matter has been allocated to a Tribunal member and that he would probably receive an invitation for a hearing in the near future.
11. On 16 February 2015, the Tribunal sent the applicant an invitation to a hearing on 20 April 2015 at 9am. The invitation was sent by email to the address that the applicant had given in his application to the Tribunal. The invitation included the advice that:
- a) the Tribunal had been unable to make a favourable decision on the information then before it; and

- b) if the applicant did not attend the hearing and no adjournment had been granted, the Tribunal may make a decision without further notice.
- 12. The invitation also asked the applicant to complete and return a “response to hearing invitation” form. The applicant did not do so and did not otherwise respond to the Tribunal’s hearing invitation
- 13. A Tribunal case note indicated that, in accordance with the relevant member’s instructions, a Tribunal officer attempted to telephone the applicant at 8:11am on 20 April 2015 to confirm his attendance at the hearing scheduled for that day. The case note recorded that the call went to message bank and the Tribunal officer left a message for the applicant to call the Tribunal to confirm his attendance at the hearing.
- 14. The applicant did not call back and did not attend the hearing. Paragraph 3 of the Tribunal’s reasons for decision records that the Tribunal directed that the applicant again be telephoned and the call again went to message bank. The Tribunal proceeded to determine the matter in the applicant’s absence.
- 15. **The Tribunal’s reasons**
- 16. After reviewing the history of the matter, the Tribunal determined that it was appropriate to make its decision pursuant to s.362B of the Act. The Tribunal noted that, to satisfy the definition of “bogus document”, it was merely necessary for the Tribunal to have a reasonable suspicion that the document was bogus. The Tribunal considered that the information from IDP provided a sound basis for such a reasonable suspicion.
- 17. Consequently, the Tribunal found that the applicant did not meet public interest criterion 4020. As no material had been put to the delegate or to the Tribunal relating to compelling or compassionate circumstances, the Tribunal saw no basis for waiving the requirements of public interest criterion 4020. The result was that the applicant did not meet the relevant criteria for the grant of the visa. Accordingly, the Tribunal affirmed the delegate’s decision.

Ground of application

18. The only ground of review in the application filed on 13 May 2015 is:

I applied for subclass 485 on 10 January 2011. I provided all the documents to the department with my application then my application was refused on 26 June 2013 after that I applied to MRT against the decision. On 16 February 2015, the tribunal wrote to me advising that it had considered all the material before them but was unable to make a favourable decision and the [tribunal] invited me for MRT hearing on 20 April 2015. And there for my application was refused and as I am not satisfied with the decision and I am applying for Federal Court application. (errors in original)

19. This appears to be an application for merits review, which this court is not permitted to provide. The applicant said in his affidavit in support of his application that he believed there was a jurisdictional error in the Tribunal's decision. However, he gave no indication in his affidavit of what that jurisdictional error might have been.
20. The applicant appeared at the hearing before this court without the benefit of legal representation. He was unable to elaborate on the asserted jurisdictional error. He simply claimed that he was the one who set the test. Again, this is an issue going to merits review, which this court is not permitted to provide.

Other matters

21. There was some discussion at the hearing before this court, and written submissions filed subsequently by the first respondent, directed to the question of whether the amendment to s.362B of the Act effected by the *Migration Amendment (Protection and Other Measures) Act 2015* being, Act No. 35 of 2015 ("the Amending Act") applied to this case.
22. I accept the first respondent's submissions that the amendments did not apply to this case. The provisions dealing with the application of the amendments are set out in Part 2 of Schedule 4 of the Amending Act, which commenced on 18 April 2015. Relevantly, the amendments applied where:

- a) the application to the Tribunal was made before the commencement of Schedule 4, but a decision on the review had not been made as at the commencement of Schedule 4; and
 - b) on or after the commencement of Schedule 4, the applicant is invited to appear before the Tribunal.
23. In the present case, the application to the Tribunal was made before the commencement of Schedule 4 of the Amending Act. However, the invitation to appear before the Tribunal was issued on 16 February 2015, which was before the commencement of Schedule 4, on 18 April 2015. Consequently, the old version of s.362B of the Act applied in this case.
24. I considered whether it was the invitation or the appearance that had to occur before 18 April 2015. However, if the Parliament had intended the latter, it would have said:
- the applicant is invited to appear before the Tribunal on or after the commencement of Schedule 4.*
25. There was also some discussion at the hearing, and in the first respondent's written submissions, about whether it was legally reasonable, in the sense outlined by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, (2013) 139 ALD 181, (2013) 297 ALR 225, (2013) 87 ALJR 618, [2013] HCA 18, for the Tribunal to have proceeded to determine the matter in the applicant's absence without taking any further steps to obtain evidence from him.
26. In *AZAFB v Minister for Immigration and Border Protection* (2015) 68 AAR 171, [2015] FCA 1383 North J held that the Tribunal had acted unreasonably and made a jurisdictional error when it did not attempt to contact the applicant by mobile telephone or email when he failed to appear at the hearing. That was so, particularly because the applicant in that case had filed a "substantial and serious written submission" with the Tribunal. The Federal Court also apparently accepted the applicant's evidence that he did not receive the hearing invitation because he had changed his address and notified the Department, but not the Tribunal, of his new address.

27. *AZAFB* is clearly distinguishable from the present case. In the present case, the applicant did not file a “substantial and serious written submission” with the Tribunal. Moreover, in the present case, a Tribunal officer did telephone the applicant at 8:11am on the morning of the hearing and left a message asking him to confirm his attendance. Later, when the applicant did not attend the hearing, the Tribunal again telephoned the applicant but the call went to message bank.
28. It is true that the applicant in the present case showed some interest in the progress of his case in the Tribunal by telephoning the Tribunal on 9 February 2015. However, there is no evidence that the applicant did not receive the Tribunal’s invitation to the hearing. The invitation was sent by email to the address that the applicant gave in his application to the Tribunal. There is no indication that the email bounced back. It is in fact the same email address that the applicant gave this court in his application filed on 13 May 2015.
29. In all the circumstances, I am not persuaded that the Tribunal acted unreasonably in proceeding to determine the matter in the applicant’s absence.
30. It also seems to me that it was open to the Tribunal to reasonably suspect that the applicant’s IELTS test results were a bogus document as defined. The evidence from IDP was sufficient to found a reasonable suspicion. That means that the applicant did not meet public interest criterion 4020. There was no evidence before the Tribunal regarding compelling or compassionate circumstances that may have warranted a waiver of public interest criterion 4020. In all the circumstances, it seems to me that the Tribunal’s decision was reasonably open to it and was free from jurisdictional error.
31. Consequently, the application must be dismissed with costs.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Judge Riley

Date: 1 August 2016